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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1001

ESTATE OF ETHEL M. DUVAL, DECEASED, BY THOMAS M. ROBINSON, JR., AND WESTON SHATTUCK ROBINSON, AS EXECUTORS OF HER LAST WILL AND TESTAMENT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 20–29) is reported in 4 T. C. 722. The opinion of the Circuit Court of Appeals (R. 76–80) is reported in 152 F. 2d 103.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 24, 1945. (R. 80.) The order denying the petition for rehearing was en-

tered on December 26, 1945. (R. 81.) The petition for a writ of certiorari was filed on March 26, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The decedent and her sister guaranteed the payment of certain corporate notes. At the time of the decedent's death and up to the date of the hearing before the Tax Court, both the corporate maker and the sister were solvent and fully able to pay the notes. May the amount of the decedent's asserted liability be deducted from the value of the gross estate under Section 812 (b)(3) of the Internal Revenue Code and if so, should the value of the decedent's rights over against the corporate maker and co-guarantor be included in the gross estate under Section 811 of the Internal Revenue Code?

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * * *

(26 U. S. C., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(b) *Expenses, Losses, Indebtedness, And Taxes.*—Such amounts—

* * * * *

(3) for claims against the estate,

* * * * *

as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered, * * *. The deduction herein allowed in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded upon a promise or agreement, be limited to the extent that they were contracted bona fide and for an adequate and full consideration in money or money's worth. * * *
(26 U. S. C., Sec. 812.)

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

The decedent, Ethel M. DuVal, died testate on April 9, 1942. On August 17, 1937, the M. K. Blake Estate Company obtained a loan from the Bank of America National Trust and Savings Association of Oakland, California in the amount

of $162,000, payable three years thereafter, evidenced by the company's promissory note of the same date and secured by a deed of trust executed the same day. (R. 21.)

At the same time, and at the bank's request, the decedent and her sister, Mary J. Robinson, endorsed the note as follows (R. 22):

> For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and I hereby waive presentment, demand, protest, notice of protest and notice of nonpayment.
>
> (Signed) ETHEL M. DUVAL
> MARY J. ROBINSON

On November 2, 1941, the company borrowed from the bank an additional $20,000, payable August 2, 1944, giving its promissory note therefor. The second obligation was also secured by the deed of trust above referred to. The note was endorsed by the decedent and her sister in the following manner (R. 22):

> For value received, I hereby guarantee payment of the within obligation and all renewals or extensions thereof and all taxes and insurance premiums and any other sums that may become due and payable under and by virtue of the provisions of the deed of trust (or mortgage) securing the aforesaid note, and I hereby waive presentment, demand, protest, notice of protest and notice of nonpayment.

> I also hereby waive (a) the right, if any, to the benefit of, or to direct the application of, any security hypothecated to the holder until all indebtedness of the maker to the holder, howsoever arising, shall have been paid; (b) the right to require the holder to proceed against the maker, or to pursue any other remedy in the holder's power; and agree that the holder may proceed against the undersigned directly or independently of the maker, and that cessation of liability of the maker for any reason other than payment, any extension, forbearance, change of rate of interest or acceptance, release or substitution of security or any impairment or suspension of the holder's remedies or rights against the maker, shall not in anywise affect the liability of the undersigned hereunder.

At the time the above notes were executed and endorsed, the decedent and her sister, Mary J. Robinson, were the owners of a majority of the company's outstanding capital stock. The decedent was president of the company and Mary J. Robinson was its secretary. (R. 23.)

On August 26, 1941, the company and the bank joined in an agreement extending the maturity date of the note for $162,000 to August 2, 1944. The decedent and Mary J. Robinson gave their written consent to the extension. (R. 23.)

At the decedent's death the unpaid balance of the principal of the two notes amounted to $175,000.

No part of this amount has been paid since her death. (R. 23.)

After the decedent's death the bank presented its claim for $175,000 against her estate, the claim providing that it was made "by virtue of the guaranty of said deceased of two promissory notes of M. K. Blake Estate Co., a corporation, dated August 17, 1937, and November 2, 1941, respectively." (R. 23.) The claim was delivered to the executors in June 1942 and allowed by them July 1942 for its full amount. (R. 23–24.)

The decedent, by her will, created a residuary trust. Shortly prior to March 15, 1943, a plan was agreed upon between the executors and their attorney whereby the decedent's estate could be distributed. The plan provided that the entire estate should be distributed to the trustee subject to the payment of the bank's claim. This plan has never been carried out. (R. 24.)

In response to a request by the trustee, the bank, on March 17, 1943, sent to him a "Consent to Distribution" providing that the bank "hereby consents to the distribution of the above entitled estate without payment of its claim, reserving, however, its claim against Mary J. Robinson, who, with said decedent, guaranteed said promissory note." (R. 24.)

At the same time, the bank sent to the trustee a "Withdrawal of Request for Special Notice." (R. 24.)

On April 7, 1943, the claim was approved by the Judge of the Superior Court of Alameda County, California. (R. 24.)

On October 25, 1943, the executors of the decedent's will filed with the probate court their first account, in which they reported the claim for $175,000 as an allowed and approved claim. This account was approved by order of the court on November 5, 1943. (R. 24.)

At the date of the decedent's death, and at all times since, to the date of the hearing before the Tax Court, both the maker of the notes, the M. K. Blake Estate Company and the co-guarantor, Mary J. Robinson, have been solvent and fully able to pay the notes in question. (R. 24–25.) The Tax Court held that the decedent's estate could suffer no loss by virtue of the guaranties and sustained the Commissioner's determination disallowing the deduction. (R. 25–29.) The Circuit Court of Appeals affirmed the decision of the Tax Court and held that the decedent's estate possessed valuable rights over against the corporate maker and co-guarantor which had to be included in the value of the gross estate and which offset the deduction allowable for the contingent liability on the guaranties. (R. 76–80.)

ARGUMENT

The decision of the court below is plainly correct and presents no conflict in decisions. The Circuit Court of Appeals did not deny that the

contingent liability of a guarantor could be deducted from the value of the gross estate as a claim against the estate. *United States* v. *Mitchell,* 74 F. 2d 571 (C. C. A. 7th). It merely held that a guarantor possesses rights of subrogation, contribution or reimbursement which must be included as property in the gross estate when they have value. And where, as here, the corporate maker and co-guarantor were expressly stipulated to be "fully able to pay the notes in question" (R. 25), the rights over could only be held to be worth the face amount of the secondary obligation.

Petitioners suggest that the court below, in valuing the rights over, erroneously emphasized the "solvency" of the corporate maker and disregarded the "fair market value" criterion specified in Section 81.10 of Treasury Regulations 105, promulgated under the Internal Revenue Code. (Br. 27–37.) They assert, therefore, that *Commissioner* v. *Wragg,* 141 F. 2d 638 (C. C. A. 1st), and the instant case are in conflict with *Guggenheim* v. *Helvering,* 117 F. 2d 469 (C. C. A. 2nd), certiorari denied, 314 U. S. 621. In the *Wragg* case the court held that the rights over were valueless because the primary obligor was insolvent, while in the *Guggenheim* case the court stated that the chances that the primary obligor might not be able to pay the full amount of the debt must be considered in valuing the rights

over. We fail to see the alleged conflict, and the requirement under the *Guggenheim* decision that uncertainties connected with guaranty obligations be taken into account is not violated here in view of the finding that not only were the corporate maker and co-guarantor solvent, but fully able to pay the claims. (R. 25.)

Petitioners also assert that the decision below disregards the California rule that the rights of subrogation, contribution, reimbursement and exoneration do not arise until payment and hence could not have existed as property to be included in the gross estate at the time of the decedent's death. (Br. 13–27.) Despite petitioners' insistence that the court below has perpetuated its allegedly original error of *Parrott* v. *Commissioner,* 30 F. 2d 792, certiorari denied, 279 U. S. 870 (Br. 14–15), the California Supreme Court, in a case involving the very same estate as that involved in the *Parrott* case reached a result which is entirely consistent with that decision and allowed a deduction to a decedent's estate which reflected the contribution due. *Estate of Parrott,* 199 Cal. 107. None of the cases cited by petitioners indicates that this is not still the applicable California rule. Thus the narrow distinction sought to be made here does not have the support of the California courts for the practical purpose of applying a taxing statute.

CONCLUSION

The decision below is correct. There exists no conflict of decisions nor any other occasion for further review.

Respectfully submitted,

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APRIL, 1946.

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